The Place of Public School Education In the Constitutional Scheme

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I. INTRODUCTION

It is widely recognized that many American public school systems graduate, or fail to graduate, substantial numbers of students who are largely unprepared to play any significant role in our civic life. This state of affairs is said to result from a number of causes, some of which may be at least partially within the scope of responsibility of the school or, more broadly, the state, even if these causes involve only state inadvertence or inaction.

This state of affairs is widely lamented, but more controversial is whether the problem is one of federal constitutional dimension and, if so, in precisely what respects the Constitution is implicated. Suppose a representative group of plaintiffs asserts that despite its own due diligence, it has been graduated or been driven from the local public school system in a condition unfit to participate with minimal competence in the public's affairs. Could such an assertion appropriately take the form of an alleged violation of a particular federal constitutional right?

There are a number of individual rights provisions of the Constitution to which such plaintiffs might be tempted to point, such as those guaranteeing equal protection, due process in both procedure and substance, the privileges and immunities of citizens, and even the first or ninth amendment. This article argues that each of these approaches is problematic, and that none responsively addresses the underlying constitutional problem of broad civic incompetence. This assertion does not mean, however, that the problem of what might be called state-caused civic incompetence does not in any sense rise to federal constitutional dimension or that federal constitutional litigation is necessarily an inappropriate remedy. This article maintains instead that the most straightforward, least speculative, and least strained analysis of substantial state-caused civic incompetence

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reads such a state of affairs as incompatible or incongruent with the Constitution's text and intent as a charter of representative self-government by enfranchised citizens. This wrong is not so directly a matter of the violation of the individual constitutional rights of the ill-prepared students, or of inequality of individual rights, as it is a collective failure to implement a presupposition of the Constitution, or a basic assumption embodied in the Constitution itself. This presupposition might be stated in various ways, but the essential notion is that under this Constitution, as distinct from most others, government is to be in a sense self-government. To go further, it might be argued that this Constitution envisions at least the possibility of a politics in which the natural play of allied and opposed interest groups is partly transcended by a politics of citizen reflection, discussion, deliberation, and choice based on a desire to recognize and promote the public good.

This article suggests that if the drafters and ratifiers of our Constitution sought to structure the political process partly through that document, the state may not legitimately act, or fail to act, without justification in ways that tend, even unintentionally, to substantially undermine the crucial presuppositions relied upon by and embodied in the ratified Constitution. Such a state of affairs does not violate any particular provision of the Constitution in the sense that an unreasonable search or seizure does. However, it presents us with the same choice of either allowing the repugnant state-caused condition to continue or living fully by the adopted Constitution as the supreme law of the land. Those persons left grossly undereducated for reasons at least partially attributable to the state are, of course, in some sense individually the victims of the state, and undoubtedly suffer competitive job market harm. However, the essence of this article is not that they as individual victims are denied a constitutional right to meaningfully contribute to or individually profit from public life, but rather that the public as a whole is denied the possibility of their so contributing, contrary to the clear sense of the Constitution as a charter of collective self-government. The public as a whole is the precise relevant victim, just as the individual uneducated student is the most direct victim of his competitive injuries in the job market.

Despite this unusual focus, it hardly seems sensible, in view of the vitally important stakes, to conclude that even what might be thought of as appalling levels of state-caused civic incompetence amount only to a nonjusticiable social problem, that no one in particular has legal standing to sue or a cause of action, and that

the problem must be solved through the political process alone without the threat or assistance of constitutionally based litigation. Instead, we should allow appropriate individuals who have been rendered civically incompetent by the state to sue for declaratory or injunctive relief on behalf of the broader enfranchised public or as the public's agent, if nonjudicial remedies seem potentially inadequate and if the practical problems of such litigation seem surmountable or at least endurable.

While the approach suggested in this article is novel and perhaps radical, it can be placed in a reasonably supportive established case-law environment. It possesses some important practical advantages over nonjudicial approaches and over individual constitutional right-based, as well as nonconstitutionally based, litigation strategies. The discussion below outlines the nature and severity of state-caused civic incompetence, addresses and resolves the leading practical problems attending the implementation of the approach alluded to above, responds to other possible objections, including those relating to federalism, the complexity of the litigation, the suppression of diversity and experimentation in education, and the feasibility of judicially inspired compliance or redress in this area, and elaborates on the costs and disadvantages of alternative strategies.

II. The Federal Constitutional Litigation Environment

It can fairly be said that, at a minimum, the existing body of federal constitutional decisions establishes no significant obstacles to the viability of litigation focusing on a school system's or state's failure to provide a reasonable opportunity to acquire, through public school education, a minimally adequate degree of civic deliberative competence to substantial numbers of students. The most closely related federal constitutional litigation is generally individual rights-based in nature, even where the cases argue that it is a broader class of poor persons, or persons attending public school in poor districts, who are disadvantaged. The theory most frequently selected in the federal constitutional context is that the plaintiff students, or would-be students, have been denied the equal protection of the laws.

The two leading cases in the federal equal protection area are *San Antonio Independent School District v. Rodriguez*[1] and *Plyler v. Doe*.[2] *Rodriguez* involved an equal protection challenge to the

1. 411 U.S. 1 (1973).

2. 457 U.S. 202 (1982). *See also* Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988).

Texas state system of financing public schools, based on substantial disparities among the school districts in resources available and expenditures for elementary and secondary education. The Supreme Court upheld an admittedly imperfect financing system,[3] finding no relevant suspect classification of rich and poor persons or districts,[4] and finding that no constitutionally fundamental right or interest in education was burdened by the Texas system.[5] The Court therefore applied only minimum scrutiny, and held that the Texas school financing system was rationally related to the legitimate state interest in local control of the public educational process.[6]

In an important qualification, the Court indicated that:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[7]

The majority in *Rodriguez* therefore seemed to disavow any implication as to the equal protection standards to be applied to a case in which the plaintiff alleged the educational opportunity afforded to be radically inadequate, or inadequate in any sense other than being merely unequal to that accorded others.[8] Logically, the educational opportunity afforded two different persons might be fully adequate on some external standard, yet unequal, or equal yet inadequate. The equality and adequacy of educational opportunity tend to merge to the extent that one wishes to measure adequacy of educational opportunity in terms such as labor market competitiveness or the ability to successfully promote one's own interests. Thus, *Rodriguez* holds open the possibility of a fundamental federal con-

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3. *Rodriguez*, 411 U.S. at 55.

4. *Id.* at 28.

5. *Id.* at 37.

6. *Id.* at 47-50, 55.

7. *Id.* at 37.

8. This qualification was noted in cases such as Olsen v. State, 276 Or. 9, 18, 554 P.2d 139, 143-44 (1976) ("no charge that a basic minimal education was not provided in all districts" in the *Rodriguez* case). The language in *Rodriguez* defining a minimally adequate educational opportunity, quoted above, has been quoted with approval in state constitutional cases such as McDaniel v. Thomas, 248 Ga. 632, 644, 285 S.E.2d 156, 165 (1981).

stitutional right to a minimally adequate educational opportunity, as at least loosely defined in *Rodriguez*. It probably goes too far to say that "[t]he 'unheld holding' of *Rodriguez* was that all Americans have a right to an adequate education,"[9] but *Rodriguez* is not incompatible with such an argument.

In *Plyler*, the Supreme Court struck down on equal protection grounds a Texas statute denying to undocumented alien children within Texas the same access to free public education as that accorded to citizen children. The Court majority explicitly denied that education in public schools rose to the level of a fundamental constitutional right,[10] but did recognize that education unavoidably plays a fundamental role in the public life in a practical sense,[11] and that education can therefore hardly be constitutionally classed with other mere governmental benefits.[12] The vital importance of at least minimal educational opportunity for the public and for the directly affected individuals played a crucial role in the Court's attribution of irrationality to the Texas statute.[13]

While some of the language in the *Plyler* majority opinion should directly discourage those favoring fundamental individual right status for minimal or equal educational opportunity, the Court has even more recently, in dicta, appeared to reopen the door. In *Papasan v. Allain*,[14] the Court served notice that "[a]s *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[15]

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9. Preovolos, Rodriguez *Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 75 (1980). *But see* Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988) (5-4 decision) (no fundamental right to public school education triggering heightened scrutiny under the equal protection clause).

10. *Plyler*, 457 U.S. at 223 ("[n]or is education a fundamental right") & 221 ("Public education is not a 'right' granted to individuals by the Constitution.") (citing *Rodriguez*).

11. *Id.* at 221.

12. *Id. See also* Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 175 (1983).

13. *Plyler*, 457 U.S. at 223-24.

14. 106 S. Ct. 2932 (1986).

15. *Id.* at 2944. *See also* Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 58 & n.223 (1987) ("[E]ducation is going through a period of ripening at the state level which may bear fruit in the Supreme Court."). *But see* Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988) (5-4 decision) (no fundamental right to public school education triggering heightened scrutiny under the equal protection clause).

Realistically, the Court may be groping for a way of constitutionally recognizing the importance of basic educational opportunity without simultaneously committing itself to the proposition that states must provide essentially equal educational opportunity in practice to all students, if the states provide educational opportunity to any. The Supreme Court often seeks, as do other courts, to distinguish between the absolute versus merely relative deprivation of an alleged right to educational opportunity[16] in order to pave the way for an inference that an "absolute" deprivation of educational opportunity might be constitutionally unacceptable, where mere relative deprivations or inequalities in educational opportunity might be more easily justified.

An attempt to turn the distinction between absolute and merely relative deprivation or discrimination into a constitutionally crucial line of demarcation may be unsatisfactory. Virtually any significant deprivation of a right or discrimination contains both relative and absolute dimensions, and it will often be difficult to tell whether a particular deprivation is either relative or absolute. Often, the inequality of the state of affairs, or the relative dimension, may seem more abhorrent than any absolute loss to those disfavored. Sometimes, even if we set considerations of inequality or relative deprivation aside, a state of affairs may seem constitutionally unjustifiable even though some measure of opportunity or benefit is being provided to even the least well-off.

For example, if one group of children is afforded the opportunity to obtain only a fourth grade education, while another group is given the opportunity to obtain a twelfth grade education, it is true that the first group is relatively deprived, but they are also being absolutely deprived of the opportunity to acquire a twelfth or even a sixth grade education, a fact of independent significance. Is such a limited educational opportunity an absolute or a relative deprivation? The

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16. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1023 (Colo. 1982) ("[A]ll educational financing cases are *sui generis* in the sense that the alleged deprivation is relative rather than absolute."); Horton v. Meskill, 195 Conn. 24, 35, 486 A.2d 1099, 1105 (1985) ("the discrimination is relative rather than absolute.") (quoting the earlier Horton v. Meskill, 172 Conn. 615, 645, 376 A.2d 359, 373 (1977)); Robinson v. Cahill, 62 N.J. 473, 487, 303 A.2d 273, 279-80 (quoting *Rodriguez*, 411 U.S. at 25 (absence of "absolute deprivation")), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 387 n.14, 390 N.E.2d 813, 825 n.14 (1979), *cert. denied*, 444 U.S. 1015 (1980) (same); Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 68 (1987).

question is no more answerable than that of whether a $1.50 poll tax amounts to an absolute deprivation or merely a relative discriminatory burden on the exercise of the franchise. The Supreme Court struck down such a poll tax in *Harper v. Virginia Board of Elections*[17] without bothering to apply any weaker equal protection standards with regard to those poor who are able to scrape up the $1.50 than with regard to those who cannot, and are therefore presumably absolutely deprived of the franchise. It is possible to argue that a low poll tax does not absolutely deprive anyone of the franchise; it merely requires greater exertions for some than for others. This argument leaves a rather murky definition of what should count as an absolute deprivation and why relative deprivations should not be so constitutionally suspect.

In many equal protection cases it is the attempt to subordinate a given class, or to treat a class as inferior, that shocks the constitutional conscience as much as any particular thing or level of provision of which they are being absolutely deprived. The relative can constitutionally matter to us as much as the absolute. The fact that some provision is made for those disfavored may seem constitutionally inconsequential. Let us suppose that a state's school-finance system is such that some students are afforded only a fourth grade education, or are taught only in bus stations, and are excused from further schooling at age nine, while other students receive exemplary educational opportunities. If we are seeking to set the appropriate constitutional test for such a state of affairs, how likely are we to adopt as the crucial step in our logic the truth that no child is being absolutely or completely deprived of an education? If a state is constitutionally challenged for completely denying any educational opportunity to a group of children, can the state reasonably lighten its constitutional burden by providing for a single day's instruction for them, or by merely encouraging them to watch public television?

Thus, while the Court is understandably seeking some middle ground between legitimizing complete state neglect of education for some on the one hand, and being driven by the logic of fundamental rights and the equal protection clause into the political, moral, and practical morass of requiring genuinely equal educational opportunities, however measured, on the other, the purported distinction between absolute and relative deprivation is either incoherent or simply not useful. The approach traced in this article avoids any

17. 383 U.S. 663 (1966). *See also Rodriguez*, 411 U.S. at 118 (Marshall, J., dissenting).

reliance on the equal protection clause, and instead focuses on the possibility of demonstrable incapacity on the part of many students to participate with even modest competence in local and national civic life, for reasons at least partially attributable to the state, and contrary to the understanding and public expectation manifested in the text of the Constitution. While the Supreme Court has not had the opportunity to work out a coherent, principled, plausible approach to constitutional questions of educational opportunity generally, it seems fair to conclude that the Court's jurisprudence of educational opportunity on equal protection grounds poses no insuperable obstacles to the approach to educational opportunity, focusing on civic competence, developed in this article.[18]

III. The Importance of Civic Competence and the Magnitude of the Contemporary Default

Even for those who deny that educational opportunity is constitutionally paramount or that educational opportunity must be accorded to all in a roughly equal fashion, it is difficult to contend that at least up to some level, the opportunity to develop what this article has referred to as minimum civic competence is practically insignificant for the maintenance of the American constitutional system. As a practical matter, provision for at least this sort of

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18. It is worth noting that the state court decisions on state constitutional grounds, while divided on whether educational opportunity rises to the level of a fundamental constitutional right for purposes of invoking strict scrutiny in equal protection cases, are widely sympathetic to the notion of a state constitutional right to at least a minimally adequate educational opportunity. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1025 (Colo. 1982) (while equal school expenditures are not constitutionally required, educational opportunities must be "thorough"); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 387, 390 N.E.2d 813, 825 (1979) (concluding in dicta that a grossly underfinanced school system might not be constitutionally "thorough and efficient"), *cert. denied*, 444 U.S. 1015 (1980).

Thompson v. Engelking, 96 Idaho 793, 806, 537 P.2d 635, 648 (1975) similarly provides that while education is not a fundamental right, and while there is no mandate of equal expenditures for all students under the state constitution, the state may owe a state constitutional obligation to teach students the educational rudiments, and beyond. Also in dicta, Board of Education v. Nyquist, 57 N.Y.2d 27, 48-49, 439 N.E.2d 359, 369, 453 N.Y.S.2d 643, 653 (1982), *appeal dismissed*, 459 U.S. 1139 (1983), at least holds open the possibility of judicial intervention in the event of a demonstration of "gross and glaring inadequacy" of educational opportunity. At a minimum, some state constitutional decisions explicitly contrast a deprivation of equal school expenditures with a presumably more grievous deprivation of educational adequacy. *See, e.g.*, Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 651-53, 458 A.2d 758, 787 (1983). Many of the issues frequently raised in the state constitutional context are thoroughly aired in Northshore School District No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974) (en banc), *rev'd in part*, Seattle School District No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc).

education is necessary for the survival of our constitutional system in recognizable fashion.[19] This proposition is both intuitively obvious and confirmable by social science research.[20] This is a matter apart from any competitive advantages or other individualized benefits that an education may bring to the educated person, and apart from any purely economic benefits that accrue collectively to an educated populace.[21]

Civic competence requires more than bare literacy,[22] but it is also important, unfortunately, to recall that it does require bare literacy at a minimum. What civic competence ultimately requires is, at the margins, endlessly debatable. But any residual vagueness of the concept is unimportant if it is clear that civic competence generally requires literacy at a minimum and that the opportunity for literacy apparently cannot be taken for granted. It has recently been observed that:

> Many black and poor children, through no fault of their own, continue to be deprived of training in even the most basic skills, such as reading, writing and arithmetic. This deprivation works a profound and lifelong injury to these neglected youths, and cripples their ability to participate in political and economic life.[23]

The numerical figures underlying this truism are of necessity imprecise, but a forty percent functional illiteracy rate among minority youth has been cited.[24] Among the American population as a whole, the variance in the calculations of illiteracy[25] is, for present

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19. J. DEWEY, DEMOCRACY AND EDUCATION 87-88 (1944); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Thompson v. Engelking, 96 Idaho 793, 817, 537 P.2d 635, 659 (1975) (Donaldson, J., dissenting).

20. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 681, 458 A.2d 758, 802 (1983) (Cole, J., dissenting). The necessity of broad educational opportunity to the preservation and operation of the constitutional system is one of the senses in which it can be said that "[e]ducation is, however, not like a cake that has to be divided fairly [between the children]." *See* Hare, *Opportunity for What? Some Remarks on Current Disputes About Equality in Education*, 3 OXFORD REV. EDUC. 207, 210 (1977).

21. *See* E. HIRSCH, CULTURAL LITERACY 1-2 (1987).

22. *See* A. GUTMANN, DEMOCRATIC EDUCATION 139 (1987).

23. Chambers, *supra* note 16, at 55.

24. *See id.* at 57 and the widely cited report, NATIONAL COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 8 (1983) [hereinafter A NATION AT RISK].

25. *Compare, e.g.*, E. HIRSCH, *supra* note 21, at 2 ("only two thirds of our citizens are literate") *with* A NATION AT RISK, *supra* note 24, at 8 ("Some 23 million American adults are

purposes, less significant than the undeniable magnitude of the problem. Among the perhaps 23 to 25 million illiterate Americans, there can be political behavior only sharply limited in its range and depth:

> Illiterate citizens seldom vote. Those who do are forced to cast a vote of questionable worth. They cannot make informed decisions based on serious print information. Sometimes they can be alerted to their interests by aggressive voter education. More frequently, they vote for a face, a smile, or a style, not for a mind or character or body of beliefs.[26]

Such persons are generally not civically competent, and to the extent that these persons make up our enfranchised electorate, the constitutional system of self-governance lacks its own distinctive practical prerequisites.[27] Even those limited numbers of the illiterate who vote, and who might in some sense be said to have perceived and voted in accordance with their own interests, might still be said to be deficient in civic competence insofar as they lack the capacity to conscientiously choose between voting in their own perceived interests and voting on the basis of a sustained, deliberative, dialogic process for the perceived broader public or general interest.

The skills of literacy by themselves do not guarantee civic competence. Referring to the widely discussed problem of substantial "cultural illiteracy" among elementary school students, Professor Diane Ravitch has written that students in such circumstances "can read the words put in front of them, but they have no 'furniture' in their minds, no vocabulary of historical persons or events to draw upon, no reference to the ordinary literary images that fifth graders once imbibed in every common school in the nation."[28] More concretely, William Bennett has reported anecdotally that "[r]ecently I met with 70 high school student leaders—all excellent students—from

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functionally illiterate by the simplest tests of everyday reading, writing, and comprehension.") *and* J. KOZOL, ILLITERATE AMERICA 4 (1985) ("Twenty-five million American adults cannot read the poison warnings on a can of pesticide, a letter from their child's teacher, or the front page of a daily paper. An additional 35 million read only at a level which is less than equal to the full survival needs of our society.").

26. J. KOZOL, *supra* note 25, at 23.

27. *Id.* ("So long as 60 million people are denied significant participation, the government is neither of, nor for, nor by, the people.").

28. D. RAVITCH, THE SCHOOLS WE DESERVE 79 (1985). *See also* E. BOYER, HIGH SCHOOL 95 (1983); E. HIRSCH, *supra* note 21.

all over the country. When I asked them how many had *heard* of the Federalist Papers, only seven raised their hands."[29]

Whether the capacities of the average or the most talented students have recently decreased[30] is for present purposes of secondary importance in comparison to the unavoidable fact that substantial numbers of adults lack and evidently will continue to lack civic competence. A substantial segment of our adult society lacks sufficient knowledge of our society or its constitutional institutions in particular to intelligently value or to maintain and operate those institutions.[31] The ability of our constitutional system to perpetuate itself therefore becomes dependent upon the competencies of only a portion of those constitutionally intended for enfranchisement.

Even if it could be shown that technical and cultural illiteracy, insofar as they bear upon civic competence, are in the process of being reduced, the constitutional problem remains significant. In an earlier era, the franchise was obviously less widespread and the political problems of the day tended to be complex only in principle, rather than technically complex as well. With a narrow potential electorate and with most political issues not of daunting technical complexity, even relatively high levels of illiteracy were not necessarily incongruent with constitutional presuppositions. Today, however, with much broader enfranchisement and the basic domestic and foreign policy questions unavoidably complex in every sense, a deliberative, dialogic process of self-government through representatives selected with reasonable intelligence requires a greater level of minimum competency than before.

IV. Civic Competence as a Constitutional Presupposition

The explicit text of the Constitution provides for active popular participation by the enfranchised in the election of members of the House of Representatives,[32] the Senate,[33] and to a degree, the President of the United States.[34] Some measure of the intent underlying

29. W. Bennett, To Reclaim a Legacy: A Report on the Humanities in Higher Education 21 (1984) (emphasis in the original). For reference to some of the relevant statistical evidence *see also* E. Hirsch, *supra* note 21, at 4-5.

30. *See* E. Hirsch, *supra* note 21, at 4-5; Finn, *The High School Dropout Puzzle*, 87 Pub. Interest 3, 21-22 (1987).

31. *See* E. Hirsch, *supra* note 21, at 6-7.

32. U.S. Const. art I, § 2.

33. U.S. Const. art. I, § 3 & amend. XVII.

34. U.S. Const. art. II, § 1. While this kind of provision, together with those extending

the provisions respecting the exercise of the franchise can be authoritatively derived from the preamble of the Constitution itself.[35] This is not to suggest that the preamble itself bindingly confers or limits rights and powers, but that the preamble may provide some possibility of insight into the intent underlying the binding provisions of the Constitution.

The preamble, which is spoken in the voice of "we the people," suggests that the provisions of the Constitution generally are to be construed as an attempt to "secure the blessings of liberty" and to "promote the general welfare." The franchise itself, and its progressive historical extension, is therefore systematically meaningful insofar as its operation may be thought to promote the governmental effort to "secure the blessings of liberty" or to "promote the general welfare." It would be self-defeating and incoherent to constitutionally provide for the popular franchise while intending or expecting it to be exercised in ways inimical to or patently inadequate to attain the goals of the Constitution as expressed in the preamble.

Of course, general language such as "promote the general welfare" cannot afford precise insight into how the constitutional governmental structure was intended or expected to operate. The historical evidence suggests that the idea of promoting the general welfare was, and continues to be, subject to two important partially conflicting and partially overlapping lines of interpretation. These simplified models may be referred to respectively as the "interest group" and the "public interest" approaches to how the constitutional system of popular political participation is envisioned to promote the "general" welfare.

The "interest group" approach to a politics of pursuit of the general welfare has been described by Professor Cass Sunstein as entailing the view that:

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and protecting the franchise, may be thought of as individual rights-conferring provisions, it is also sensible to think of them as structural provisions of the Constitution or, more precisely, as "constitutive" provisions. *Cf.* Powell, *How Does the Constitution Structure Government?*, in A WORKABLE GOVERNMENT?: THE CONSTITUTION AFTER 200 YEARS 13, 13 (B. Marshall ed. 1987) (distinguishing between rights-provisions and structural elements of the Constitution).

35. Note the progressive expansion of the franchise through amendment XV (race), amendment XIX (gender), amendment XXIV (poll or other tax restriction on the franchise), and amendment XXVI (age). Of course, where a text such as the Constitution is unequivocal and not fairly susceptible of differing interpretations, the preamble cannot be used simply to introduce and then resolve ambiguity, but a preamble may properly be looked at to "ascertain intent and meaning," and "has been said to be a key to open the understanding of a statute." Price v. Forrest, 173 U.S. 410, 427 (1899).

> [P]olitics mediates the struggle among self-interested groups for scarce social resources. Only nominally deliberative, politics is a process of conflict and compromise among various social interests. Under the [interest group] conception, people come to the political process with preselected interests that they seek to promote through political conflict and compromise. Preferences are not shaped through governance, but enter into the process as exogenous variables.[36]

On the interest group model in its purest form, the "general welfare" enshrined in the preamble amounts only to the aggregation, in some fashion or another, of perceived individual or group interests.[37] Education, whatever its virtues, bears the risks of tyranny insofar as it may involve the illicit suppression of preference or the illicit substitution of an "educator's" preference for that of the person or group subjected to "education."[38]

Education is more unreservedly central to the second, or "public interest" approach, which conceives of popular self-rule not so much in terms of the competitive promotion of preconceived private individual or group interests, but in terms of reflection, deliberation, and public dialogue aimed at the common goal of discerning and implementing that which will promote the general welfare.[39] Particularly important for purposes of this article is the disposition of the "public interest" approach to envision the political process as legitimately involving the development or reformation of individual or group preferences, rather than viewing preferences as either merely given, as arbitrary, or not legitimately alterable.[40]

Of course, classification of individual framers within the scope of either of these approaches is difficult,[41] and both approaches retain

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36. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985) [hereinafter Sunstein, *Interest Groups*]. *See also* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 879 (1987) ("modern interest group pluralism" as viewing politics "as an unprincipled struggle among self-interested groups for scarce social resources"). For a leading descriptive model, see Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

37. *See* Sunstein, *Interest Groups*, *supra* note 36, at 32-33.

38. *See id.* at 33.

39. *Id.* at 31. *See also* Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 19 (1986) (referring to Sunstein's "attractive conception").

40. *See* Sunstein, *Interest Groups*, *supra* note 36, at 31.

41. For example, while James Madison was not entirely sanguine about the possibility of broad political deliberation and dialogue at the general citizen level, he presumed that at least elected representatives could potentially engage in genuine deliberation and that the pursuit of private gain did not exhaust the scope of politics. *See* D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 125 (1984); Sunstein, *Interest Groups*, *supra* note 36, at 76 n.203. Thomas Jefferson emphasized particularly the deliberative elements of the pursuit of the general welfare, as has been recognized recently by Professor Hirsch. *See* E. HIRSCH, *supra* note 21, at 12-13.

modern sympathizers.[42] This state of affairs reflects the undoubted consensus that while education may, at worst, be debased into an oppressive instrument of indoctrination, manipulation, or coercion, education is also typically the foundation for what this article has referred to as civic competence. If the Constitution in some sense entrusts in the electorate essential political decision-making, at least through selected representatives, in order to promote the public liberty or the public welfare, in either of the senses discussed above, it is because the Constitution relies upon and presupposes a public capacity to "deliberate and communicate"[43] among the electorate. This public capacity, or civic competence, requires at least a certain measure of opportunity for effective education among those entrusted with the franchise.[44] To will the end, or the constitutional scheme outlined above, is to will the plainly indispensable means, including the availability of at least some modest educational opportunity reasonably coextensive with the responsibilities of the franchise and of constitutional citizenship in general.

The closer one approaches the pure "interest group" conception, the greater the emphasis on education or educational opportunity as merely a private resource or individual advantage in the competitive struggle to promote one's own interests within the sphere of politics. If politics were simply a zero-sum struggle over shares, education for civic competence would then more exclusively take on the quality of a putative individual right held on an equal or unequal basis. However, our constitutional system itself embodies neither the "interest group" nor the "public interest" conception exclusively or in purest form, and must be operated so as to provide for both of these

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42. *Compare, e.g.*, Stigler, *supra* note 36 (model of competitive bidding for political influence to promote perceived interests) *with* J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 53 (J. Shapiro trans. 1971) ("Emancipation from the compulsion of internal nature succeeds to the degree that institutions based on force are replaced by an organization of social relations that is bound only to communication free from domination."). *See also id.* at 55 (emphasizing the role of discussion) & 315 (postulating a condition of "unconstrained communication"); Habermas, *Towards a Theory of Communicative Competence*, 13 INQUIRY 360, 372 (1970) (truth as referring to "a consensus achieved in unrestrained and universal discourse").

43. *See* E. HIRSCH, *supra* note 21, at 12.

44. *See id.*; Hare, *supra* note 20, at 215. Note that it is possible in principle to support minimal educational opportunity for the enfranchised without being logically committed to a constitutional right, or a presupposition in our sense, to individual basic subsistence. The framers might rationally have assumed that either one starves or one does not, but if one does not, and wishes to vote, or otherwise politically participate, the opportunity for the vote to be a potentially helpful, minimally thoughtful, minimally informed vote must generally be provided.

historically important approaches to potentially play some role.

V. The Undersupply of Basic Educational Opportunity and Possible Judicial Responses

Even under a purely competitive "interest group" model of the political process, the public may benefit, in the sense of more fully realizing their own political goals, from affording some modest educational opportunity to virtually all of their fellow citizens. Milton Friedman, whose basic sympathies for competitive market processes seem well-established, has observed that:

> A stable and democratic society is impossible without a minimum degree of literacy and knowledge on the part of most citizens and without widespread acceptance of some common set of values. Education can contribute to both. In consequence, the gain from the education of a child accrues not only to the child or to his parents but also to other members of the society. The education of my child contributes to your welfare by promoting a stable and democratic society.[45]

Thus, even on a purely competitive view, civic competence cannot be understood apart from the dimension in which it promotes an essentially universal or genuinely collective interest, rather than constituting merely a putative right, equally or unequally distributed, through which individuals may promote their own narrow political interests.

Education in this sense is a "public good" and will tend to be undersupplied by the market. Professor Friedman recognizes that *A*'s contributing to the educational socialization of *B* contributes not only to *A* and *B*'s political welfare, but to that of *C* and *D* as well, who cannot practically be identified and charged for the benefit accruing to them from *B*'s socialization.[46] *C*, *D*, and *A* have every reason, therefore, to seek to become free riders who benefit from civically competent fellow citizens whether they contribute to the cost of *B*'s educational opportunity or not. We should therefore not expect the optimal amount of civic educational opportunity to be "naturally" supplied by the market.

Recognizing civic competence as a public good, we may have some reservations about fully accepting the view, as expressed by

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45. M. Friedman, Capitalism and Freedom 86 (1962).
46. *Id.*

the New York Court of Appeals, that "the amounts, sources, and objectives of expenditures of public moneys for educational purposes . . . appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity."[47] Many of the young residents of any city or state may eventually move to other jurisdictions, leaving those who helped pay for their civic competence with only a small portion of the accruing benefits. That the city or state may perhaps later benefit from the influx of civically competent young persons now in other jurisdictions not now identifiable is practically irrelevant. Cities or states may, for reasons such as these, undersupply educational opportunity for civic competence from the standpoint of the welfare of the society as a whole. Local control over educational spending, even to the extent that it is a matter of genuine local choice, cannot guarantee a socially optimal result.[48]

One other more exotic, but practically significant, problem lies in the fact that much of the public benefit that will accrue from civic competence bestowed on a young student will accrue not to the voters of today, but to those of a generation or so from now. Obviously, there may be substantial identification or overlap of interest in this regard among generations. Neverthelesss, to the degree that one electoral generation discounts the welfare of another, the public good to future citizen *C* of *C*'s fellow citizen *B*'s civic competence may well tend to be undersupplied by existing citizens *A* today, to the extent that not yet existing *C*s cannot bargain with the present generation *A*.[49]

Compounding these difficulties is the undeniable fact that increasing the minimum educational opportunity available to public school students tends, in many geographical areas, to involve in some measure a redistributive transfer from the middle class to those less

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47. Board of Educ. v. Nyquist, 57 N.Y.2d 27, 38-39, 439 N.E.2d 359, 363, 453 N.Y.S.2d 643, 648 (1982), *appeal dismissed*, 459 U.S. 1139 (1983).

48. *Cf., e.g.*, Board of Educ. v. Walter, 58 Ohio St. 2d 368, 377-78, 390 N.E.2d 813, 820 (1979) (finding local control to be a "rational basis" supporting the Ohio system of public school financing), *cert. denied*, 444 U.S. 1015 (1980).

49. For a sense of the variability of approaches to the discounting of future welfare and of the inclination to benefit current cohorts at the expense of the future, consider the political difficulty of achieving substantial federal budget deficit reduction, despite the widespread belief that large federal deficits involve a substantial redistribution of wealth from future to present voters, and see Wilson, *The Rediscovery of Character: Private Virtue and Public Policy*, 81 PUB. INTEREST 3, 5, 10-13 (1985). *See also* J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 161 (3d ed. 1962); Buchanan, *The Samaritan's Dilemma*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 84, 84 n.6 (E. Phelps ed. 1975).

well-off[50] and to those with generally less political influence to effectively express their will in the state legislature.[51] Thus, there is no guarantee that a legislature will reflect the degree of enlightened self-interest and altruism necessary to provide financially for a reasonable possibility of civic competence for the least well-off citizens or school districts. This would, on the approach developed here, be logically and practically inconsistent with the intent underlying the Constitution, but this inconsistency also should be no surprise, in view of the ample historical precedent for such inconsistency between the actual features of state-established school systems and the provisions of the Constitution.[52]

There is no guarantee that either the market or the legislature will generate either the socially optimal or the constitutionally minimal sufficient level of opportunity for civic competence among the enfranchised. Litigation directed toward obtaining some form of judicial mandate or incentive toward such a goal, or at least the credible threat of such litigation, may therefore be required. The approach adopted in this article is to view the provision of franchise-wide or citizenship-wide minimal civic competence opportunity as simply constitutionally mandated, or as a condition that must obtain if the text and intent underlying the Constitution are to be practically or meaningfully implemented.

Those deprived of the requisite educational opportunity plainly may suffer in a variety of other practical or constitutional respects. For purposes of this analysis, however, they are merely the logical persons to be granted standing to redress a serious, not otherwise resolvable unconstitutional state of affairs, as they embody most directly and severely an injury to all citizens who would benefit from a more universally shared civic dialogue on the governmental issues of the day. There is a sense in which such persons allege only injuries common to all persons, which suggests a denial of standing.[53] Nevertheless, on balance it seems best to suggest that a person who has been rendered civically incompetent by virtue of state policy or state action, and who can plausibly allege the redressability of the injury to herself or others through some sort of cognizable judicial remedy, is not seeking to litigate a mere abstract, general, or contrived

50. *See supra* notes 23-24 and accompanying text.

51. *See supra* note 26 and accompanying text.

52. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

53. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). *But cf.* Flast v. Cohen, 392 U.S. 83 (1968).

grievance in which his or her interest is merely attenuated or ideological, or in which we ought reasonably to accept final disposition by the political branches.[54] At some point, we must choose between the last degree of doctrinal fastidiousness on the standing issue in other contexts, and the last substantial opportunity for redress of a constitutional harm with severe, widespread, and dramatic potential impact.

While individual rights-based approaches to minimum or equal educational opportunity present reduced traditional standing problems, they suffer not only from possible excessive stringency, but from the vices of indefiniteness, indeterminacy of result, monumental complexity, and irrelevance to the essentially public, collective nature of the problem of civic incompetence. Professor Kurland has noted, with regard to an individually-based claim to adequate educational opportunity, that approaches based on the equal protection clause seem irrelevant: "It is not equality but quality with which we are concerned."[55] Reference to the privileges and immunities clause,[56] while avoiding the errant focus on questions of equality,[57] leads us into the virtual "dead letter" or at best undeveloped status of the fourteenth amendment privileges and immunities clause,[58] and more importantly, the misconception that the essence of the problem of broad civic incompetence is one of violated individual constitutional rights. The same absence of responsive logical fit with the nature of the civic incompetence problem also attends any attempt to draw upon the equally murky ninth amendment[59] or the doctrine of substantive due process.[60]

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54. For a general discussion of current standing doctrine, in both its Article III and prudential components, see Allen v. Wright, 468 U.S. 737 (1984).

55. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last?"* 1972 WASH. U.L.Q. 405, 419. *But see* Preovolos, *supra* note 9, at 118 (At the level of broad individual interest, adequacy and equality of education actually converge.).

56. *See* Kurland, *supra* note 55, at 419; Chambers, *supra* note 16, at 68-69.

57. *But see* Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 720-21, 530 P.2d 178, 198 (1974) (en banc) (finding the federal equal protection clause and the state constitutional guarantee of (equal) privileges and immunities to be coextensive), *rev'd in part*, Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc).

58. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 319 (3d ed. 1986); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 448 (1986) (discussing the impact of The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 558-59 (2d ed. 1988). *See also* B. SIEGAN, THE SUPREME COURT'S CONSTITUTION 68 (1987).

59. *See* Chambers, *supra* note 16, at 69.

60. *See* Preovolous, *supra* note 9, at 119. Constitutional arguments based on privileges or immunities, the ninth amendment, or substantive due process additionally should confront the

To some minimal degree, the problem of civic incompetence perhaps can be judicially mitigated by recourse to theories not dependent upon federal constitutional rights. Some state constitutions contain education provisions which are at least open to interpretation as a guarantee of minimal educational opportunity for individual competitive labor market purposes or competitive political purposes, if not also for the broader civic health of the polity.[61] Recourse to state constitutional provisions, however, risks a piecemeal and non-uniform result nationally in addressing what this article has depicted as a national problem.

For corresponding reasons, pursuing the possibility of an entirely nonconstitutional tort remedy based on alleged state negligence or a state failure to provide for minimal educational opportunity[62] is inadequate. The courts have rightly been wary of awarding money damages to individual ill-educated graduates[63] on any theory. This is sensible from the perspective of this article. If the courts are to presume to extract or redirect significant amounts of money from or within the public school systems, such expenditures should go not toward compensating those badly educated, but directly toward reducing the amount and severity of bad public education. Finally, it would be perfectly reasonable for the courts to hold on the issue of causation that overall, or in the statistical aggregate, the state may bear a judicially detectable responsibility for the extent of civic incompetence in a way sufficient for the theory presented in this article. However, the courts are not equipped to reliably determine, in individual cases, whether a given student's educational deficiencies should be ascribed to the state, or instead to non-state "physical,

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argument that the State's failure to affirmatively provide for a particular level of educational opportunity does not impair anyone's liberty in a constitutional sense. *See* B. SIEGAN, *supra* note 58, at 94; Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). *But see generally* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

61. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 514, 303 A.2d 273, 295, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 516, 585 P.2d 71, 94 (1978) (en banc). *But cf.* Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 377 (1979) (rejecting individual judicial enforceability).

62. *See* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979) for cases at least hinting at a constitutional or non-constitutional remedy, even though these cases are perhaps more accurately read as "educational malpractice" claim cases.

63. *See* cases cited *supra* note 62 and Ratner, *Rebuttal of Elson*, 63 TEXAS L. REV. 919, 919 n.1 (1985).

neurological, emotional, cultural, [or] environmental"[64] causes, in the way a tort standard requires.

VI. Constitutionally Mandated Opportunity to Acquire Minimum Civic Competence and the Complementary Role of Equal Protection

The approach taken has focused on the federal Constitution. It should not be controversial in principle that the states and local public school systems are not constitutionally entitled to unreasonably impair, or even to fail to reasonably promote, the minimally effective operation and functioning of the federal constitutional system. This is especially true in the area of public schooling, where the contemplated functioning of the federal constitutional system historically has depended crucially on state responsibility and state provision. What may be more controversial is whether the states or school systems can be said to have legally caused what is alleged to be a conspicuous local pattern of broad, dramatically inadequate educational opportunity, or whether any sort of legal or equitable relief is reasonably likely to significantly promote improvement in educational opportunity so as to open the possibility of more nearly universal minimum civic competence among the electorate.

Currently, patterns of disappointing public school student achievement are widespread and readily detected. But this only begins the inquiry. If we are ultimately searching for lack of minimal civic competence, how are we to operationalize or make concrete and measurable, in a reasonably objective way, the presence or absence of this condition? And if we find it, how do we know that such a condition should, at least in part, be charged to state action or inaction, rather than being attributed to individual laziness, lack of educational aptitude, voluntary choice, or some other factor in ways that do not even indirectly implicate the state?

While reasonably concrete and valid proxies for minimal civic competence can be settled on once and then applied with only minor adjustments to all sorts of litigation settings, issues such as state responsibility are harder to establish, as a matter of broad principle, with a view to reducing the cost of litigating the issue in every

64. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860 (1976).

successive case.[65] It is hardly sensible to utterly rule out an entire general theory of action merely because some resolvable intellectual problems attend it, or because of legal or factual complexity. The widely recognized cause of action for inequality of educational opportunity, brought under state constitutional provisions, certainly generates at least comparable complexity.[66]

Based on the case law and the relevant research it seems inevitable that the state or school system[67] will often be found to bear substantial legal causal responsibility for conditions that amount to plainly insufficient opportunity to acquire broad minimum civic competence. This is not to suggest, however, that the school or state will invariably be found to be the sole cause of any local pattern of discouraging scholastic performance, or that there are no causes of poor school performance that would ordinarily be thought to be beyond the potential effective control of state instrumentalities.

It is often suggested that educational achievement is crucially affected by variables such as the ability and motivation of students and students' home environment.[68] More particularly, it has been

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65. *Cf.* National Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672, 690 (D.C. Cir. 1973) (noting that use of rulemaking power in addition to case-by-case adjudication would avoid the necessity of requiring the agency to prove certain broad, generic social science-type regularities individually and repeatedly in each separate case), *cert. denied*, 415 U.S. 951 (1974).

66. *See, e.g.*, Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 350, 651 S.W.2d 90, 95 (1983) (trial involved 287 exhibits and 7,400 pages of transcript); Serrano v. Priest, 180 Cal. App. 3d 1187, 226 Cal. Rptr. 584, 590, 604 (345 exhibits, 3,736 page transcript; "evidence at trial revealed nearly a score of statistical techniques that could be and have been used to measure school finance equity"), *petition for review granted*, 723 P.2d 1248, 229 Cal. Rptr. 663 (1986); Serrano v. Priest, 18 Cal. 3d 728, 767, 557 P.2d 929, 952, 135 Cal. Rptr. 345, 368 (1976) (en banc) ("almost 4,000 pages of testimonial transcript . . . and a clerk's transcript of almost equal size"), *cert. denied*, Clowes v. Serrano, 432 U.S. 907 (1977); Horton v. Meskill, 195 Conn. 24, 46, 486 A.2d 1099, 1111 (1985) ("Our decision in *Horton I* gave . . . only limited guidance about the precise constitutional test by which to measure access to substantially equal educational opportunities."); Board of Educ. v. Nyquist, 57 N.Y.2d 27, 37, 439 N.E.2d 359, 362, 453 N.Y.S.2d 643, 647 (1982), ("an extended nonjury trial which produced 23,000 pages of transcript and 400 exhibits"), *appeal dismissed*, 459 U.S. 1139 (1983); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 369, 390 N.E.2d 813, 815 (1979) (2,400 exhibits and 7,530 pages of trial transcript), *cert. denied*, 444 U.S. 1015 (1980); A. GUTMANN, *supra* note 22, at 128 (1987) (identifying three distinctively different basic interpretations of equality of educational opportunity).

67. That for which the public school system or municipality is responsible is also ultimately the responsibility of the state as well. *See* Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 349-50, 651 S.W.2d 90, 95 (1983); Robinson v. Cahill, 62 N.J. 473, 496-97, 513-16, 303 A.2d 273, 285, 294-95, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

68. *See, e.g.*, the summary of defendants' analysis in Abbott v. Burke, 100 N.J. 269, 287-89, 495 A.2d 376, 386 (1985); Elson, *Suing to Make Schools Effective, or How to Make a Bad Situation Worse: A Response to Ratner*, 63 TEXAS L. REV. 889, 897 (1985).

argued that "education in and for our kind of society is peculiarly dependent upon those sentiments, behaviors, and values that typically arise and are fostered in the cultural milieu of the middle-class family."[69] Nevertheless, it would be naive to simply assume that student ability, motivation, and values, along with the home environment in general, are invariably not to any degree a reflection of choices and policies adopted by the municipalities and states. To locate an educationally significant factor in the home, or in the psyche of the student, is not necessarily to exclude state causation. While the issue of the scope or extent of state causal responsibility raises controversial issues,[70] individual attitudes and family structures and resources may in part reflect "public" decision-making.[71] As one commentator has observed, "[i]f schools or other public institutions reliably affect not only the competence but, for example, the aspirations, motivation and ability of those who attend them, then these aspirations, motivation and ability cannot be regarded as merely private merits or deficiencies."[72]

More affirmatively, it has been said that "we have accumulated a great deal of evidence that faulty policy in the schools is the chief cause of deficient literacy."[73] This may be because the schools "teach a fragmented curriculum based on faulty educational theories,"[74] or because of schools' low academic expectations,[75] or an absence of sufficient order and discipline in some public schools.[76] Assuming

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69. Berger, *The Repatriation of the School*, in CHALLENGE TO AMERICAN SCHOOLS 81, 83 (J. Bunzel ed. 1985).

70. *Cf.* O'Neill, *Opportunities, Equalities and Education*, 7 THEORY & DECISION 275, 289 (1976) ("Disagreements about the analysis of equal educational opportunity derive largely from disagreements over the boundary between the public and the private domain.").

71. Consider examples as clear and direct as King v. Smith, 392 U.S. 309 (1968) (voiding the "man in the house" rules for excluding otherwise eligible children from certain forms of welfare assistance). *See generally* Sunstein, *supra* note 60. Educationally, it has been asked, for example, whether high levels of childrens' television watching may perhaps in part reflect school instructional requirements, or their absence. *See* E. HIRSCH, *supra* note 21, at 20.

72. O'Neill, *supra* note 70, at 289.

73. E. HIRSCH, *supra* note 21, at 20. This article again does not equate minimum civic competence with bare literacy, but views literacy as plainly one of the prerequisites of civic competence.

74. *Id.* at xiii.

75. *See* J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT 178 (1982).

76. *See id.* The authors of this widely-recognized study conclude specifically that quite aside from differences in student background:

> Apart from mathematics coursework for seniors, the greatest differences in achievement between private and public schools are accounted for by school-level behavior variables (that is, the incidence of fights, students threatening teachers, and so forth). The disciplinary climate of a school, such as the effectiveness and fairness of

that factors such as low teacher expectations and inadequate discipline do play some role in low academic achievement rates in some public schools, as is widely charged,[77] it is difficult to see low student achievement as a phenomenon independent of state causation and utterly immune to any assertion of even partial governmental control.[78]

Courts that seek to encourage, through some appropriate judicial spur, the broader availability of opportunity to acquire minimum civic competence through the public schools need not single out particular factors, such as teacher expectations and school discipline, and judicially endorse their significance. The schools, or the state, should be allowed by the courts to umpire the social science evidence based on their own experience, and the courts should not discourage responsible experimentation in addressing problems of insufficient educational opportunity. Similarly, the courts should not feel bound by mere assertions that matters such as school discipline are inevitable reflections of intractable social pathology, or that for reasons of bureaucratic interest, public apathy, or hostility to additional school funding,[79] it is practically infeasible to significantly reduce behavior such as violence, threats against teachers, drug use, or more passive noncooperation within schools. The Constitution may require the undertaking by schools of unpopular or inconvenient reforms.[80]

On the approach recommended by this article, the courts should decide only concrete cases in the least intrusive way, but should not view minimum civic competency litigation in the familiar, purely adversarial context, in which a plaintiff in a zero-sum game seeks substantial compensation and a defendant resists by all permissible

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discipline and teacher interest, affect achievement at least in part through their effect on these school-level behavior variables.

Id. See also D. RAVITCH, THE SCHOOLS WE DESERVE 111 (1985) (interpreting this report as supporting the view that "school policy affects student achievement and student behavior").

77. Even those generally skeptical of "effective schools" research seem to concede some consensual support in the evidence for the significance of these two factors. *See* Elson, *supra* note 68, at 898. *Cf.* Abbott v. Burke, 100 N.J. 269, 278-80, 495 A.2d 376, 381 (1985) (on the state defendants' own theory, plaintiffs were suffering educationally, if at all, because of ineffective school management by local school boards).

78. *See* Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEXAS L. REV. 777, 804 (1985).

79. For example, the familiar finding that school or school district spending is not correlated with important school output measures, *id.* at 808; Lujan v. Colorado State Board of Education, 649 P.2d 1005, 1020 (Colo. 1982), is often cited to blunt the thrust of school financing system challenges based on the equal protection clause, but it equally suggests that reduced in-school violence need not await vast infusions of additional public school spending.

80. *See* Brown v. Board of Educ., 347 U.S. 483 (1947).

means. In particular, there should constitutionally and practically be no need for the plaintiffs to prove that the defendants have acted negligently, or that moral blame attaches. Once some reasonably measurable proxy for minimum civic competence is agreed upon, the burden should fall upon the state, in light of the available social science evidence,[81] to show why, especially in light of the possibilities for further research and experimentation, not even marginal progress can reasonably be expected over any reasonable period of time. While the courts should respect state autonomy, federalism, local educational priorities, and local educational establishment expertise as to the practicalities of alternative means, as well as any relevant vested contractual rights, they should recognize no vested interest in the perpetuation of school policies that countenance conditions within the school that are patently disruptive of the educational process. Not attributing moral blame to the schools may serve the practical end of reducing any tendency toward defensiveness on the part of the local educational establishment.[82] Likewise, declining to judicially ratify educationally unsuitable conditions within schools helps to emphasize that even if particular schools themselves feel powerless to restore order and discipline internally,[83] this is a traditional state function, and the state should be looked to if necessary for the restoration of that minimum school order necessary to give meaning and effect to the Constitution's explicit and implicit scheme of representative self-government.

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81. *See* sources cited *supra* notes 73-78.

82. *Cf.* Elson, *supra* note 68 (expressing a concern for possible educator demoralization). Professor Elson generally envisions the litigation in rather harsh, adversarial, hypertechnical, legalistic terms, featuring battles over evidence admissibility, etc. *Id.* at 892.

83. This is not to suggest that minimum civic competence is best generated through penitentiary-like authority structures, but that, for example, even a student whose chronically disruptive behavior is attributable to some state policy must be given only a limited number of chances, as well as due process, before his adverse effects on the educational environment of others must, in fairness to those others, be remedied. *See* Goss v. Lopez, 419 U.S. 565 (1975).

On our theory, the federal Constitution sets at least some minimal ultimate limits on the range of legitimate local educational policies and priorities in spending and enforcement. Within limits, the schools may not simply ignore severe discipline problems on the grounds that addressing them raises some political opposition, or is to some degree time-consuming and unpleasant, or would impair the image of the schools in the mind of the public. One may reasonably suspect, on the latter issue, that if a school system is largely anarchic and is generating large numbers of civic incompetents, this will not be long unrecognized by the public, and that conscientious reform efforts chosen by the schools themselves, even if judicially spurred in a general way, may even enhance, rather than impair, the public's perception of the particular schools. *Cf.* Elson, *supra* note 68, at 910 ("judicial oversight could diminish the public's confidence in teachers, administrators . . . .").

Admittedly, neither the schools nor the courts can directly measure civic competence itself. Some reasonably close proxy that is more readily quantifiable must be selected, but the inevitable tradeoff between perfect validity and perfect reliability of measurement is familiar and inevitable.[84] Standard achievement tests of basic literacy skills commend themselves on the theory that civic competence requires literacy at a minimum. Most schools already voluntarily administer some form of such tests;[85] judicially requiring this practice would therefore be only minimally intrusive.

There are familiar objections to such an approach, but they do not seem compelling. Pencil and paper achievement tests are not invariably a transparent window into the mind of the student,[86] and there is some risk of institutional cheating, or at least of "teaching to the test." The obvious responses must be that institutional cheating or misreporting of scores will be rare, or at least difficult to duplicate every year, and that even if otherwise illiterate students are taught little else other than to take a standardized test reasonably well, substantial constitutional progress has been made.

Focusing judicial attention on standardized testing instruments already voluntarily adopted by the schools, or similar to those already adopted, has the additional virtue of minimizing the sacrifice in terms of the values of federalism,[87] deference to legislative branches,[88] and deference to professional judgment[89] that may be required. These interests are of some moment, but they may rightly be sacrificed in some small measure where this is necessary to remedy what may amount to a continuing constitutional travesty. It is important to remember that the courts need not dictate to the states or schools the methods to be used to achieve minimal progress,[90] or otherwise

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84. *See* Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 470 (1987) (inverse relationship between measuring the right thing and measuring it well).

85. *See* Preovolos, *supra* note 9, at 115; Elson, *supra* note 68, at 902.

86. *See* Serrano v. Priest, 18 Cal. 3d 728, 748, 557 P.2d 929, 939, 135 Cal. Rptr. 345, 355 (1976) (en banc).

87. *See id.* at 762, 557 P.2d at 948, 135 Cal. Rptr. at 364 (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973)).

88. *See* McDaniel v. Thomas, 248 Ga. 632, 644-45, 285 S.E.2d 156, 165 (1981) (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973)).

89. *See* Elson, *supra* note 68, at 913-14.

90. *See* Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 520, 585 P.2d 71, 96 (1978) (en banc) (the choice of means of discharging constitutional duty may be left to the state legislature). It should be borne in mind that a pattern of educational opportunity can be attacked as unconstitutional without the plaintiff or court having to identify any particular policy, regulation, or statute as itself unconstitutional. *See* Washakie County School Dist. No. 1 v. Hersehler, 606 P.2d 310, 335 (Wyo. 1980).

constrain legitimate local choice, judgment, and experimentation.[91] The schools reasonably should be asked not to assume that their innovation and experimentation will be judicially endorsed if such efforts result only in perpetual failure, where apparently comparable schools employing different but apparently transferable techniques are consistently more successful. To the extent that the courts eventually do constrain consistently inferior educational policy choice, it should be remembered that greater judicial deference is called for at the most advanced, highly technical or professional levels of education[92] than at the more rudimentary levels with which this article is exclusively concerned.

Any reliance on standardized paper-and-pencil testing ordinarily raises issues of unfairness toward those particularly disadvantaged students least prepared to succeed on such instruments. It is important to recall that in our context, the disadvantaged can only gain from their use. Standardized tests, on the approach suggested herein, are not to be used to elevate allegedly objective achievement requirements so as to discourage or exclude the disadvantaged.[93] They are instead to be used to focus judicial attention with precision on the need to devise more constitutionally effective educational institutions and practices, in and outside of schools, that redound to the educational benefit of the most disadvantaged.[94]

It is no less important to consider the range of reactions on the part of school officials and individual teachers[95] to the approach advocated herein. One commentator has concluded that "[l]eft to their own devices, incompetent and careless educators can be expected to continue and defend their past practices, regardless of the harm

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91. *See* McDaniel v. Thomas, 248 Ga. 632, 647, 285 S.E.2d 156, 167 (1981); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 380-82, 390 N.E.2d 813, 822 (1979), *cert. denied*, 444 U.S. 1015 (1980).

92. *Cf.* Board of Curators v. Horowitz, 435 U.S. 78, 89-90 (1978), *discussed in* Elson, *supra* note 68, at 914. Plainly, courts are in a better position to evaluate literacy or illiteracy than whether an individual would be a competent physician.

93. *Cf.* Chambers, *supra* note 16, at 60 n.21 (expressing misgivings about the equity of using achievement tests to raise academic standards).

94. This is not to suggest that it is clear that using more demanding standardized achievement tests as a sorting device must necessarily have an aggregate adverse impact on the educational achievement of the disadvantaged. *Compare id. with* Finn, *supra* note 30, at 17, 22 (suggesting that higher academic standards, as commonly measured, may even tend to reduce the dropout problem).

95. It can hardly be assumed that all public schools are responsively hierarchical, such that convincing the highest authority levels insures immediate and full compliance or implementation at all subordinate levels. *See* Elson, *supra* note 68, at 906 n.74.

to their students."[96] Professor Elson has also observed more sanguinely that "[u]nlike the situation of the individual educator who is charged with acts of personal incompetence or carelessness toward an individual student, no substantial internal restraints discourage school administrators from adopting more effective pedagogical practices once the superiority of those practices becomes apparent."[97] The approach advocated by this article again does not rely on or seek to fix individual blame, as through allegations of negligence, but realistically recognizes the possibility of vested educational establishment interests, fear of change, unresponsive bureaucracies, and institutional inertia. If it were generally true that administrators distinctively gravitated with reasonable dispatch away from failed and mediocre policies toward demonstrably superior policies, improvement would proceed spontaneously without the need for coercive state inducement.[98] Thankfully, there is evidence that school reform can be reasonably successful even where it is initially imposed, in greater detail than this article envisions, by parties other than the immediately affected school officials themselves.[99]

Looking to the role of the public at large, or the taxpayers, it is possible to object that a proposal along the lines advocated herein will in fact be educationally counterproductive, as it may lull the public into believing that significant improvement in the schools can be accomplished without massive infusions of new funds.[100] This does seem possible, at least in the short term, before reality catches up with what turns out to be an overly optimistic public expectation. It seems equally likely, at the very least, that a public climate broadly supportive of the sort of judicially-inspired educational reform advocated herein would also tend to be sympathetic to the expenditures reasonably necessary to effectuate public school reforms, at least within the limits discussed above.[101] Judicially-spurred civic competence opportunity reform may even turn out to tend to be tied, as a political package, to increased or equalized school funding in other respects. It is also possible that the public may become more generally

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96. *Id.* at 913.

97. *Id.*

98. *See generally* M. GORBACHEV, PERESTROIKA (1987) (observing that bureaucratic reform is not bound to occur rapidly, universally, or spontaneously).

99. *See* Ratner, *supra* note 63, at 927.

100. *See* Elson, *supra* note 68, at 911.

101. *See supra* section V on the tendency toward the undersupply of basic educational opportunity.

sympathetic to increased public school funding only when the public perceives that the schools are capable of dealing more adequately with problems such as dramatic illiteracy rates.

Realistically we should expect minimum civic competence opportunity litigation to have a significant equalizing effect in practice, even though such litigation does not rely on the equal protection clause. The approach advocated herein may afford some of the benefits of equal protection litigation with few of the disadvantages of such litigation. We have seen not only that equal protection litigation fails to capture the essence of the public issue addressed above,[102] but that equal protection litigation offers no bargain in manageability,[103] even if thorny issues such as distinguishing absolute from merely relative deprivation[104] are set aside.

VII. Conclusion

There are deeper reasons for not relying on the equal protection clause in this general area. If education is not thought of as a constitutionally fundamental right,[105] an equal protection approach will likely have little payoff, since most of the inequalities generated by public educational systems can be defended under minimum scrutiny. Even if the governmental interest in respecting local control of educational systems[106] is rejected as illusory in the case of impoverished school districts,[107] it will often be possible for the state to portray substantial increases in, or even equalization of, school funding as necessarily coming at the expense of other significant state or local programs of benefit to the public.[108] Taking educational opportunity to be a constitutionally fundamental right, especially in

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102. *See generally supra* section II. Most fundamentally, "[t]he Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 89 (1973) (Marshall, J., dissenting), *quoted in* Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 347, 651 S.W.2d 90, 93 (1983).

103. *See supra* note 66 and accompanying text.

104. *See Rodriguez*, 411 U.S. at 64-65 (White, J., dissenting).

105. *See supra* section II.

106. *See Rodriguez*, 411 U.S. at 49-50; Goodwin, *The Crisis in Public Education and a Constitutional Rationale for Federal Intervention*, 1988 Det. C.L. Rev. (publication forthcoming).

107. *See Rodriguez*, 411 U.S. at 64-65 (White, J., dissenting).

108. *See* Serrano v. Priest, 180 Cal. App. 3d 1187, 226 Cal. Rptr. 584, 619 n.39 ("Public education receives approximately one-half of the state's budget. Out of the other half, the state must meet competing claims for important state interests such as welfare and medical assistance, roads and parks and public safety."), *petition for review granted*, 723 P.2d 1248, 229 Cal. Rptr. 663 (1986).

light of the rigorous strict scrutiny equal protection implications that would apparently follow, is unavoidably deeply controversial. Historically, there has long been an unresolvable dialectic between expanding and equalizing educational opportunity, and the desire of many parents to provide not merely absolutely good, but relatively better educational opportunities for their own children.[109] Despite the force of the arguments in favor of genuine equality of educational opportunity, or something approaching it,[110] it seems clear that any reasonably close approach to genuine equality of educational opportunity, even among public school students, would involve uncomfortably deep state intrusion into the familiar realm of family autonomy and parental authority over the scope of their own children's education.[111] Until such time as this historical conflict of goals can be resolved, or until such time as the basic terms of equal protection jurisprudence are fundamentally changed, advocates of educational opportunity minima cannot look to equal protection litigation for consistently reliable help.

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109. *See Rodriguez*, 411 U.S. at 49; Board of Educ. v. Walter, 58 Ohio St. 2d 368, 377-78, 390 N.E.2d 813, 820 (1979), *cert. denied*, 444 U.S. 1015 (1980).

110. *See, e.g.*, Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32, 48-59 (1973).

111. *See* J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY 51-67 (1984); A. GUTMANN, *supra* note 22, at 132.